

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JULIO GONZALES)	
Claimant)	
VS.)	
)	
ALLIED, INC.)	Docket No. 233,046
Respondent)	
AND)	
)	
MARYLAND CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated May 8, 1998, wherein claimant was awarded benefits in the form of medical care and temporary total disability compensation.

ISSUES

- (1) Did claimant suffer accidental injury on the date or dates alleged while employed with respondent?
- (2) Did claimant's accidental injury arise out of and in the course of his employment with respondent?
- (3) Claimant further raises an objection to the admissibility of respondent's Exhibit No. 3 from the preliminary hearing, objecting to the document as not being an actual business record but something prepared in anticipation of litigation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant alleges accidental injury beginning February 1, 1998, through March 24, 1998, as a series of accidents resulting in bilateral carpal tunnel syndrome. Claimant began working for respondent on January 27, 1998, as a laborer. Claimant first noticed symptoms on or about March 7, 1998. Initially, he went to his personal physician, Dr. Sambhundh Panichabhongse (hereinafter referred to as "Dr. Sam"). On March 9, 1998, claimant reported his hand problems to his foreman and later to the respondent's safety director, Cheryl Rohleder. The medical records of Dr. Sam indicate a history of pain and swelling for approximately 2 years. During a conversation with the claimant, Ms. Rohleder was advised that claimant had problems off and on for approximately 2 years but had never filed a workers compensation claim against his previous employer. Claimant was off work from March 12 through March 20, 1998, and returned to work full duty on March 23 and March 24, 1998. Claimant reported that he was working on a jackhammer during these last two days but respondent's records indicate claimant did not work a jackhammer on the dates alleged. His job, however, was hand intensive manual labor.

Bilateral nerve conduction tests performed by Dr. Fe T. Villarante on March 15, 1998, confirmed claimant suffered from bilateral carpal tunnel syndrome. Dr. Sam scheduled carpal tunnel releases bilaterally but the surgeries were cancelled when he was advised the insurance carrier was refusing to pay.

Conclusions of Law

In workers compensation litigation, it is the claimant's burden to prove his entitlement to an award by proving the various conditions upon which his right to a recovery depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 1997 Supp. 44-508(g).

In order for a claimant to collect workers compensation benefits under the Workers Compensation Act, he must suffer accidental injury "arising out of and in the course of" his employment.

The phrase "out of" employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course" of employment relates to the time, place, and circumstances under which the accident occurred and means the injury had happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

Whether claimant suffered accidental injury arising out of and in the course of his employment in this instance hinges to a great degree on the credibility of the witnesses who testified before the Administrative Law Judge. In this case, both claimant and respondent's representative testified in person before the Administrative Law Judge at the preliminary hearing. The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusions because he had the opportunity to assess the credibility of the witnesses. The Administrative Law Judge found claimant suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged. The Appeals Board finds, based in part upon the credibility assessment provided by the Administrative Law Judge and in part upon the "last injurious exposure rule" found in Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d 548, 889 P.2d 1151 (1995), that claimant has proven accidental injury arising out of and in the course of his employment with respondent, with an injury date through March 24, 1998, his last day of employment. See also Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

With regard to claimant's contention that respondent's Exhibit C is an inadmissible document prepared in anticipation of litigation, the Appeals Board finds that the right of a party to appeal from a preliminary hearing is strictly controlled by K.S.A. 1997 Supp. 44-551 which grants appeals from preliminary hearings only if it is alleged that the Administrative Law Judge exceeded the Administrative Law Judge's jurisdiction in granting or denying the relief requested at preliminary hearing. K.S.A. 1997 Supp. 44-534a provides guidance regarding the disputed issues which allow Appeals Board review and the legislative limits placed upon those issues. An issue dealing with the admissibility of a business document at a preliminary hearing does not fall under any of the jurisdictional issues specifically listed in K.S.A. 1997 Supp. 44-534a and the Appeals Board finds the Administrative Law Judge did not exceed his jurisdiction in allowing the document to be admitted into evidence for preliminary hearing purposes. Therefore, the claimant's appeal with regard to the admissibility of respondent's Exhibit 3 is dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated May 8, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

c: Kent Roth, Great Bend, KS
Jeff S. Bloskey, Overland Park, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director